In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 576

WILLIAM JOSEPH RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 11-20) is reported at 335 F.2d 299.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1964. A petition for rehearing *en banc* was denied on September 11, 1964. The petition for a writ of certiorari was filed on October 10, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for wilfully failing to register and file a tax return while engaging in the business of receiving wagers.

STATUTE INVOLVED

26 U.S.C. 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on the second count of a two-count in-

dictment (App. 1-2)[1] charging that although he was in the business of receiving wagers on his own behalf and on the behalf of others and had received such wagers, petitioner wilfully and knowingly failed to register and file a tax return as required by law, in violation of 26 U.S.C. 7203 (App. 1-2, 13).[2] Petitioner was sentenced to six months' imprisonment and fined $1,000 (App. 2). The court of appeals affirmed, one judge dissenting (Pet. App. A 11-20; 335 F.2d 299).

The pertinent evidence may be summarized as follows:

Internal Revenue Agent Stanley Wheeler testified that on the evenings of August 20, 21, 23, and 24, 1963, at a racetrack in Cook County, Illinois, he saw petitioner talking to and receiving money from various individuals and, upon receipt of the funds, making notations on various pieces of paper. On each of these days the agent, prior to a particular race, approached petitioner, stated he wanted a certain horse and gave petitioner money. For example, just before the sixth race on the evening of August 20, the agent gave petitioner $4.00 and said he wanted the "No. 7 horse." Petitioner took the money and responded "No.

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[1] "App." designates petitioner's Appendix in the court of appeals now on file with the Clerk of this Court. Also on file with the Clerk is the Appendix to the government's Brief in the court below (designated "G. App.") and separately backed papers containing the proceedings in the court of appeals.

[2] Petitioner was acquitted by the jury on the first count of the indictment, which charged a knowing and wilful failure to pay the special occupational tax on wagers (App. 1, 13).

7, 2 and 2" and made notations (App. 3-4). Another Internal Revenue agent (Howard Pollitz) witnessed petitioner's activities at the track on the night of August 24. He saw petitioner receive money from various individuals including Agent Wheeler (App. 6). Shortly thereafter, that same evening, agent Pollitz arrested petitioner and asked him if he had a wagering tax stamp. Petitioner replied, "I don't know what you are talking about" (App. 6).[3] At the time of his arrest, petitioner was searched and found to possess, *inter alia*, some $638.00 in currency, racing tickets purchased at the track, and numerous cards. These papers bore various notations indicating the horses that were running, the amount and type of wagers and a "recap sheet" of the week's wins or losses. Agent Wheeler, who had a great deal of experience with horse betting, characterized these papers as "wagering paraphernalia" (App. 8-9).

The government also adduced evidence that petitioner had failed to register or file a "special tax return and application for registering" for the tax year ending June 30, 1964 (App. 3).

Petitioner testified in his own defense that he was an "expert" on trotting races, and went to the races regularly for two or three years. He described himself as a "horse player" and a "tout", with a regular clientele of customers whom he advised, for whom he made bets at the race track, and from whom he generally received some money when he picked a win-

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[3] Petitioner replied similarly when he was later asked if he accepted wagers (App. 7).

ner. He stated that he knew what a "bookmaker" was but denied that he was one or that he ever took bets for profit. He said that after he took money from Agent Wheeler, he made a bet for him at the pari-mutuel window at the race track.[4] He explained the items taken from him at the time of his arrest as used for handicapping the horses (App. 10-11; G. App. 1-5).

In the course of discussing instructions concerning possible inconsistencies between petitioner's trial testimony and earlier statements to the agents, the trial court said: "As I recall it, the testimony of the agent was that he [the petitioner] didn't know anything about the law, isn't that right, the wagering tax stamp?" (App. 13).

ARGUMENT

Petitioner does not deny that the evidence showed that he was accepting wagers at the track on a regular basis. Nor does he argue that in determining whether he wilfully failed to register and file a tax return the court of appeals tested the jury verdict under an improper standard. His contention is only that the court below was incorrect in ruling that the evidence was sufficient to meet that test. Accordingly, there is no issue of significance warranting review

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[4]Agent Wheeler testified that after he placed a bet with petitioner, he did not see him go to the pari-mutuel window (App. 12-13). On the evening of August 24 before the fifth race Agent Wheeler had given petitioner a "marked" $10 bill (App. 5). This bill was included among the money found on petitioner's person following his arrest after the sixth race that same evening (App. 8).

by this Court; rather, the decision involves the application of an unchallenged general principle to the particular circumstances of this case.

We start with the premise that proof of wilfulness in the present context requires proof of knowledge of the legal obligation to register and file a tax return. See, *e.g.*, *Yarborough* v. *United States*, 230 F.2d 56, 61 (C.A. 4), certiorari denied, 351 U.S. 969; *Hargrove* v. *United States*, 67 F.2d 820, 823 (C.A. 5); *Haner* v. *United States*, 315 F.2d 792, 793 (C.A. 5). But there is no requirement that such proof of wilfulness be direct rather than circumstantial. *Holland* v. *United States*, 348 U.S. 121, 139. Indeed, in *Ingram* v. *United States*, 360 U.S. 672, this Court affirmed conspiracy and substantive convictions against the two principal petitioners relating to their gambling tax obligations even though "There was no direct evidence to show that any of the petitioners knew of these taxes" (360 U.S. at 674), on the ground that the evidence in full permitted such a conclusion. See, also, *Edwards* v. *United States*, 334 F.2d 360 (C.A. 5), reversing, *en banc*, *Edwards* v. *United States*, 321 F.2d 324.

While the factual question here is a close one, the court of appeals properly found that the evidence supports the verdict. Petitioner apparently operated as a bookmaker at the track with a regular clientele of bettors. He himself admitted that he was an expert horse player who attended the trotting races almost daily. While it is true that petitioner, when asked if he had a tax stamp, answered that he did not know what the agent was talking

about, it is equally true that he subsequently gave the same answer when asked if he accepted wagers. The jury could reasonably find that the answer was no more than an effort at evasion in both instances and concludes that anyone so intimately connected with the business of horse betting, who regularly dealt with gamblers, must have been aware of his tax obligation. Cf. *United States* v. *McGonigal*, 214 F. Supp. 621, 622 (D.Del).[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

NOVEMBER 1964

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[5] The fact that the jury acquitted petitioner on count one of the indictment does not affect the validity of his conviction on the second count. *Dunn* v. *United States*, 284 U.S. 390, 393-394.

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